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Yung Ing Ing v Hunfara Construction Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–2628–12 OF 2013
MOHD HISHAMUDIN YUNUS, DAVID WONG AND UMI KALTHUM JJCA
24 JULY 2015

C

Companies and Corporations — Directors — Cheques issued by company dishonoured — Whether director personally liable for cheques under s 121(2)(c) of the Companies Act 1965 — Whether failure to state current name of company in cheques entitled respondent to claim from director who issued cheques — Whether payee of cheques was deceived into believing that director signing on behalf of totally different entity

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Statutory Interpretation — Construction of statutes — Intention of statute — Purposive approach — Whether court should resort to — Where Legislature includes particular term in one part or section of statute but omits it in another part or section of same — Whether it be presumed Legislature acts intentionally and purposely in disparate inclusion or exclusion — Whether s 121(2)(c) of the Companies Act 1965 applied to cheques — Whether crossed cheques were negotiable instruments

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Hunfara Construction Sdn Bhd, the respondent, had commenced a civil suit against YWP Builders Sdn Bhd ('YWP Builders') and another. On 28 March 2013, a consent judgment was recorded in respect of that civil suit whereby YWP Builders and the other defendant were ordered to jointly and severally pay the respondent the sum of RM1.1m by four instalments. It was also ordered that in default of any installment payment, the whole remaining judgment sum would become immediately payable with interest. Pursuant to the consent judgment, the appellant being a director of YWP Builders issued four post-dated cheques to the respondent to comply with the consent judgment. On 12 July 2013, YWP Builders had changed its name to YWP Construction Sdn Bhd ('YWP Construction'). On 30 May 2013, the first cheque issued by YWP Builders Sdn Bhd was dishonoured upon presentation for payment. Despite receiving a letter of demand for the amount due under the consent judgment YWP Builders, now known as YWP Contsruction, had made no attempt to pay the outstanding sum of RM1.1m. Consequently, the respondent as the holder of the four post-dated cheques, filed an application for an order that the appellant be made personally liable for the four post-dated cheques premised on s 121(2)(c) of the Companies Act 1965 ('the Act'). The

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High Court found that pursuant to s 4 of the Act, the appellant as the director of YWP Contsruction was an officer of the company. As such, the High Court held that the appellant should be liable to the respondent for the sum of RM1.1m being the amount due on the four post-dated cheques. This was the appellant's appeal against that decision. It was the appellant's contention that there was no breach of s 121(2) of the Act and that in interpreting s 121(2) of the Act the court should adopt a purposive approach.

Held, allowing the appeal with costs of RM10,000:

(1) (per **Mohd Hishamudin Yunus** and **Umi Kalthum JJCA**) The trial judge had erred in allowing the plaintiff's claim and in assuming that s 121(2) applied to cheques. It is a principle of interpretation of statutes that where the legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, that it be presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion. Therefore the inclusion of the word 'cheque' in limb (c) of s 121(2) and the exclusion of the word 'cheque' in the latter limb of that subsection was done intentionally and purposely by Parliament; and the court should give effect to the intention of Parliament that whilst the former limb (limb (c)) applied to cheques, the latter (subsequent) limb did not. If the latter limb did not apply to cheques then the failure to state the current name of the company in each of the four cheques, as a matter of law, did not entitle the respondent to claim from the appellant for payment in respect of the sums as specified in the cheques pursuant to s 121(2) of the Act (see paras 25 & 30).

(2) (per **Mohd Hishamudin Yunus** and **Umi Kalthum JJCA**) Even if the words 'negotiable instruments' in s 121(2) were to include cheques as contended by the respondent, the four cheques in the present case were each crossed with the words 'A/C PAYEE ONLY', which made them non-transferable. One of the basic attributes of a negotiable instrument was the right of the payee to transfer the instrument to another. Thus, by crossing the cheque with the words 'Account Payee' the cheque became non-transferable meaning that the right of the payee to transfer the instrument was taken away by the instrument. According to the common law, such an instrument was then no longer a negotiable instrument but constituted a mere contract between the parties (see paras 34–36).

(3) (per **David Wong JCA**) In construing any statute, the starting point would be s 17A of the Interpretation Act 1948, which dictates that the court should first look for the purpose or object of the statute and in this appeal it was s 121(2)(c). Premised on the English authorities, it could be said that the object of s 121(2)(c) was to ensure that the payees of cheques were not deceived into believing that the director was signing on behalf of a totally different entity from that the director signing the cheques

belongs to. Applying the purposive approach in constructing statute, one must take into account the present prevailing circumstances and then give it an interpretation which would enhance the object of the Act. As such, in the context of s 121(2)(c), the appellant should not be held liable as there was no deception as envisaged in s 121(2)(c). Further the rule of *Foss v Harbottle*, which prescribes that a company is a separate and independent legal entity that can be sued or sue, was a basic principle that could only be dismantled by clear legislation. Hence, in interpreting s 121(2)(c), this basic principle should be given its due regard (see paras 54–55 & 60–63).

[Bahasa Malaysia summary

Hunfara Construction Sdn Bhd, responden, telah memulakan guaman sivil terhadap YWP Builders Sdn Bhd ('YWP Builders') dan satu lagi. Pada 28 Mac 2013, penghakiman persetujuan direkodkan berkaitan guaman sivil tersebut di mana YWP Builders dan defendan yang lain diperintahkan untuk secara bersesama dan berasingan membayar kepada responden sejumlah RM1.1 juta melalui empat ansuran. Ia juga diperintahkan bahawa jika ingkar terhadap mana-mana bayaran ansuran, jumlah penghakiman yang tinggal keseluruhannya akan dengan serta merta mesti dibayar dengan faedah. Berikutan kepada penghakiman persetujuan, perayu sebagai pengarah YWP Builders mengeluarkan empat cek tempoh lepas kepada responden untuk mematuhi penghakiman persetujuan. Pada 12 Julai 2013, YWP Builders telah menukar namanya kepada YWP Construction Sdn Bhd ('YWP Construction'). Pada 30 Mei 2013, cek pertama yang dikeluarkan oleh YWP Builders ditendang semasa dikemukakan untuk pembayaran. Meskipun menerima surat tuntutan untuk jumlah yang kena di bayar di bawah penghakiman persetujuan YWP Builders, yang sekarang ini dikenali sebagai YWP Construction, tidak membuat apa-apa percubaan untuk membayar jumlah tertunggak sebanyak RM1.1 juta tersebut. Akibatnya, responden sebagai pemegang keempat-empat cek tempoh lepas tersebut, memfailkan permohonan untuk perintah yang perayu dibuat sebagai bertanggungjawab secara peribadi untuk keempat-empat cek tempoh lepas berdasarkan s 121(2)(c) Akta Syarikat 1965 ('Akta'). Mahkamah Tinggi mendapati bahawa berikutan s 4 Akta, perayu sebagai pengarah YWP Construction adalah pegawai syarikat tersebut. Dengan itu, Mahkamah Tinggi memutuskan bahawa perayu patut bertanggungjawab kepada responden untuk jumlah sebanyak RM1.1 juta sebagai jumlah yang kena dibayar keatas keempat-empat cek tempoh lepas tersebut. Ini adalah rayuan perayu terhadap keputusan tersebut. Ia adalah hujahan perayu bahawa tidak terdapat kemungkiran terhadap s 121(2) Akta dan bahawa dalam mentafsirkan s 121(2) Akta mahkamah patut mengguna pendekatan maksud.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) (oleh **Mohd Hishamudin Yunus** dan **Umi Kalthum HHMR**) Hakim perbicaraan telah tersilap dalam membenarkan tuntutan plaintif dan dalam menganggap bahawa s 121(2) terpakai kepada cek-cek tersebut. Ia adalah prinsip tafsiran statut bahawa di mana perundangan melibatkan terma yang tertentu dalam satu bahagian atau statut tetapi tidak memasukkannya di dalam bahagian lain atau seksyen yang sama, bahawa ia dianggap perundangan yang bertindak dengan niat dan dengan sengaja dalam pemasukan berbeza atau pengecualian. Oleh itu pemasukan perkataan 'cheque' dalam bahagian (c) kepada s 121(2) dan pengecualian perkataan 'cheque' dalam bahagian kemudian subseksyen dibuat dengan niat dan dengan sengaja oleh Parlimen; dan mahkamah patut memberi penguatkuasaan niat Parlimen sementara bahagian sebelumnya (bahagian (c)) terpakai kepada cek-cek, bahagian kemudiannya tidak. Jika bahagian kemudiannya tidak terpakai kepada cek-cek dengan itu kegagalan untuk menyatakan nama semasa syarikat dalam setiap daripada keempat-empat cek, dari segi undang-undang, tidak memberikan hak kepada responden untuk menuntut daripada perayu bayaran berkaitan jumlah yang dinyatakan dalam cek-cek berikutan s 121(2) Akta (lihat perenggan 25 & 30).

(2) (oleh **Mohd Hishamudin Yunus** dan **Umi Kalthum HHMR)** meskipun perkataan-perkataan 'negotiable instruments' dalam s 121(2) dimasukkan dalam cek-cek seperti yang dihujahkan oleh responden, keempat-empat cek dalam kes ini adalah setiap satu dipalang dengan perkataan-perkataan 'A/C PAYEE ONLY', yang mana membuat ianya tidak boleh dipindah milik. Satu daripada ciri asas surat cara boleh niaga adalah hak penerima untuk memindahkan surat cara kepada yang lain. Oleh itu, dengan memalang cek dengan perkataan-perkataan 'Account Payee' cek akan tidak boleh dipindah milik bermaksud bahawa hak penerima untuk memindahkan surat cara tersebut diambil oleh surat cara tersebut. Mengikut common law, surat cara sedemikian oleh itu bukan lagi suratcara boleh niaga tetapi membentuk kontrak semata-mata di antara pihak-pihak (lihat perenggan 34–36).

(3) (oleh **David Wong HMR**) Dalam mentafsirkan mana-mana statut, poin permulaan adalah s 17A Akta Tafsiran 1948, yang menetapkan bahawa mahkamah patut pertamanya melihat kepada tujuan atau matlamat statut dan dalam rayuan ini adalah s 121(2)(c). Berdasarkan autoriti-autoriti English, ia boleh dikatakan bahawa matlamat s 121(2)(c) adalah untuk memastikan bahawa penerima-penerima cek tidak ditipu dalam mempercayai bahawa pengarah menandatangani bagi pihak secara keseluruhannya entiti berbeza daripada apa yang ditandatangani oleh pengarah terhadap cek yang dimiliki tersebut. Mengguna pakai pendekatan maksud dalam mentafsir statut, seseorang mesti mengambil kira keadaan semasa dan kemudian memberinya pentafsiran yang akan meningkatkan matlamat Akta tersebut. Dengan

itu, dalam konteks s 121(2)(c), perayu tidak patut bertanggungjawab kerana tidak terdapat penipuan seperti yang dibayangkan dalam s 121(2)(c). Selanjutnya peraturan dalam *Foss v Harbottle*, yang mana menyatakan bahawa syarikat adalah entiti undang-undang berasingan dan bebas yang boleh disaman atau menyaman, adalah prinsip asas yang hanya boleh dipatahkan oleh perundangan yang jelas. Maka, dalam mentafsirkan s 121(2)(c), prinsip asas ini patut diberikan perhatian yang sewajarnya (lihat perenggan 54–55 & 60–63).]]]

Notes

For case on intention of statute , see 11(2) *Mallal's Digest* (5th Ed) para 1916.
For cases on directors in general, see 3(1) *Mallal's Digest* (5th Ed) paras 178–450.

Cases referred to

Atkins (or Atkin) & Co v Wardle (1889) 58 LJQB 377 (refd)
Foss v Harbottle (1843) 67 ER 189 (refd)
Indochine et de Suez SA v Euroseas Group Finance Co Ltd and Others [1981] 3 All ER 198, QBD (refd)
Penrose v Martyr (1858) EB & E 499 (refd)
Stacey (F) & Co Ltd v Wallis [1912] 106 LT 544, KBD (refd)

Legislation referred to

Bills of Exchange Act 1949 s 81A
Civil Law Act 1956 s 3
Companies Act 1965 ss 4, 121, 121(2), (2)(c), (3)(c)
Companies Act 1862 [UK] ss 41, 42
Companies Act 1908 [UK] s 63
Interpretation Acts 1948 and 1967 s 17A

Appeal from: Originating Summons No KCH-24–113/7 of 2013

Alvin Yong (Shirleen Ong with him) (Chong Brothers Advocates) for the appellant.
Jacquelyn (Zai Hii Sing Tieng with him) (Spring Advocates) for the respondent.

Mohd Hishamudin Yunus JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court of Sabah and Sarawak at Kuching delivered on 25 October 2013.

[2] The learned High Court judge, upon hearing the respondent's originating summons application, had granted the following declaration and order:

(a) that for the purpose of s 121(2) of the Companies Act 1965 the defendant (the appellant in this appeal) be declared as the officer of YWP Construction Sdn Bhd ('the company' — formerly known as 'YWP Builders Sdn Bhd') that signed or issued the following four cheques:

(i) Public Bank Berhad ('PBB') cheque No 277319 dated 30 May 2013 for the sum of RM100,000 ('the first cheque');

(ii) PBB cheque No 277320 dated 30 June 2013 for the sum of RM330,000 ('the second cheque');

(iii) PBB cheque No 277321 dated 30 July 2013 for the sum of RM330,000 ('the third cheque'); and

(iv) PBB cheque No 277322 dated 30 August 2013 for the sum of RM340,000 ('the fourth cheque');

where in each of the four cheques the current name of the company is not mentioned. (In this judgment I shall be referring to these four cheques collectively as 'the four cheques'.)

(b) that pursuant to s 121(2) of the Companies Act 1965 ('the Companies Act'), the defendant do pay the plaintiff the sum of RM1.1m.

[3] The above declaration and order are made in accordance with the prayers sought for in the originating summons.

[4] This case involves an interpretation of s 121(2) of the Companies Act 1965. Section 121 provides:

> Publication of name
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> 121. (1) The name of the company (whether or not it is carrying on business under a business name) in legible romanised letters and the company number of the company shall appear on —
>
> (a) its seal; and
>
> (b) all business letters, statements of account, invoices, official notices, publications, bills of exchange, promissory notes, endorsements, cheques, orders, receipts and letters of credit of or purporting to be issued or signed by or on behalf of, the company,
>
> and if default is made in complying with this subsection the company shall be guilty of an offence against this Act.
>
> (1A) Where a company has changed its name pursuant to section 23, the former name of the company shall also appear beneath its present name on all documents, business letters, statements of account, invoices, official notices, publications, bills of exchange, promissory notes, endorsements, cheques, orders, receipts and letters

of credit of, or purporting to be issued or signed by or on behalf of, the company for a period of not less than twelve months from the date of the change, and if default is made in complying with this subsection the company shall be guilty of an offence against this Act.

(2) If an officer of a company or any person on its behalf —

(a) uses or authorises the use of any seal purporting to be a seal of the company whereon its name does not so appear;

(b) issues or authorises the issue of any business letter, statement of account, invoice, official notice or publication of the company wherein its name and former name (if applicable) is not so mentioned; or

(c) signs issues or authorises to be signed or issued on behalf of the company any bill of exchange, promissory note, cheque or other negotiable instrument or any endorsement, order, receipt or letter of credit wherein its name and former name (if applicable) is not so mentioned,

he shall be guilty of an offence against this Act, and where he has signed, issued or authorised to be signed or issued on behalf of the company any bill of exchange, promissory note or other negotiable instrument or any endorsement thereon or order wherein that name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company.

[5] We heard the appeal on 16 April 2015. We reserved judgment. We announced that the court will deliver its judgment on 24 July 2015.

This is my judgment.

THE FACTS OF THE CASE

[6] In the year 2012 the plaintiff (Hunfara Construction Sdn Bhd) commenced a civil suit ('the 2012 civil suit') against a company called 'YWP Builders Sdn Bhd' in the High Court of Sabah and Sarawak at Kuching (there are other defendants as well in that 2012 civil suit but we are not concerned with them for the purpose of this appeal). It is not stated in the cause papers of the present originating summons as to the cause of action in that 2012 civil suit.

[7] Be that as it may, on 28 March 2013 a consent judgment was obtained by the plaintiff against YWP Builders Sdn Bhd and one other defendant (of that 2012 civil suit) who were jointly and severally ordered to pay the plaintiff the sum of RM1.1m by way of four installment payments. (It is further ordered that in default of any installment payment, the whole judgment sum shall immediately become due and payable.)

[8] In the light of the consent judgment, YWP Builders Sdn Bhd issued the four cheques as mentioned earlier.

[9] It is not disputed that the defendant (Yung Ing Ing) when she issued the four cheques was a director of the YWP Construction Sdn Bhd and is an officer of the company by virtue of the definition of 'officer' in s 4 of the Companies Act.

[10] All the four cheques are post-dated cheques.

[11] Each of the four cheques is crossed with the words 'A/C PAYEE ONLY'.

[12] On 30 May 2013 the first cheque was dishonoured upon presentation for payment. (By virtue of the consent judgment, the whole judgment sum became due and payable with interest at the prescribed rate.)

[13] On 24 December 2012 YWP Builders Sdn Bhd changed its name to 'YWP Construction Sdn Bhd'. The company number for YWP Builders Sdn Bhd was 761221-D. When YWP Builders Sdn Bhd changed its name to 'YWP Construction Sdn Bhd' it retains the same company number. In other words, the company number for YWP Construction Sdn Bhd is still 761221-D.

[14] However, the new name 'YWP Construction Sdn Bhd' is not mentioned on any of the four cheques. But the previous name of the company, that is, 'YWP Builders Sdn Bhd' is mentioned. The company number for 'YWP Builders Sdn Bhd', that is, 761221-D, is also stated in each of the four cheques, next to the company's name.

[15] The name of the company when the 2012 civil suit was commenced was 'YWP Builders Sdn Bhd' and the consent judgment was made in that name.

[16] Todate, neither the defendant nor the company has made any payment for the sum due under the consent judgment despite the company and the defendant having received the letter of demand dated 7 June 2013.

[17] The originating summons was filed on 12 July 2013. At the time of the filing of the originating summons only the first and second cheques (dated 30 May 2013 and 30 June 2013, respectively) were due for payment. The third and fourth cheques were not.

[18] Except for the first cheque, the other three cheques were never presented to the bank for payment.

THE PLAINTIFF'S SUBMISSION

[19] It is the contention of the plaintiff that pursuant to s 121(2) of the Companies Act 1965, the defendant is liable to the plaintiff for the sum of RM1.1m being the total 'amount due' on the four cheques, in default of payment by the company.

[20] It is the further contention that the word 'negotiable instrument' in that limb of s 121(2) (the limb after limb (c)) that states:

> and where he has signed, issued or authorised to be signed or issued on behalf of the company any bill of exchange, promissory note or other negotiable instrument or any endorsement thereon or order wherein that name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company.

includes cheques.

THE DEFENDANT'S SUBMISSION

[21] It is the contention of the defendant that there was no breach of s 121(2) of the Companies Act 1965 since the former name of the company (that is to say, 'YWP Builders Sdn Bhd') and the company number '761221-D' (which is also the same company number for YWP Construction Sdn Bhd) are stated on each of the four cheques. Thus, there was no intention to deceive anyone and it is clear to anyone receiving the four cheques that they were company cheques for 'YWP Builders Sdn Bhd'/ 'YWP Construction Sdn Bhd', and not the personal cheques of the defendant. It is argued that in interpreting s 121(2) of the Companies Act 1965 the court must adopt a purposive approach, citing the following English cases:

(a) *Stacey (F) & Co Ltd v Wallis* [1912] 106 LT 544;

(b) *Atkins (or Atkin) & Co v Wardle* (1889) 58 LJQB 377; and

(c) *Banque de' Indochine et de Suez SA v Euroseas Group Finance Co Ltd and Others* [1981] 3 All ER 198.

[22] It is the further submission of the defendant that the plaintiff's claim in respect of the third and fourth cheques is premature as at the time of the filing of the originating summons (12 July 2013) these two post-dated cheques were not yet due for payment and were never presented to the bank.

A DECISION OF THE HIGH COURT

[23] At the High Court of Kuching the learned judge allowed the plaintiff's originating summons application. The learned judge ruled:

B 20. It is plain and obvious that pursuant to section 4 of the Companies Act, the Defendant, being the director of the YWP Construction Sdn. Bhd., is an officer of the company. It is not in dispute that the Defendant has signed the four cheques in question and as of today, the company has not paid the money due to the Plaintiff under the Consent Judgment despite the Defendant having received the letter of demand (Exhibit LTP-5). In the premise, pursuant to section 121(2)(c) of the C Companies Act, the Defendant shall be liable to the Plaintiff for the sum of RM1,100,000 being the amount due on the four post-dated cheques.

[24] The learned High Court judge, in her grounds of judgment, did not D embark upon any analysis of the provisions of s 121 of the Companies Act 1965.

MY DECISION

E **[25]** In my judgment the learned High Court judge, with respect, erred in allowing the plaintiff's claim and in assuming that the limb in question of sub-s (2) of s 121 of the Companies Act 1965 applies to cheques.

[26] It is important to note that limb (c) of sub-s (2) of s 121 of the F Companies Act 1965 has the word 'cheque' in it, apart from the words 'bill of exchange', 'promissory note' and 'other negotiable instrument'. Section 121(2) limb (c) reads:

(c) signs issues or authorises to be signed or issued on behalf of the company any bill G of exchange, promissory note, *cheque* or other negotiable instrument or any endorsement, order, receipt or letter of credit wherein its name and former name (if applicable) is not so mentioned. (Emphasis added.)

[27] And it is also pertinent to note that that limb of s 121(2) following limb H (c) of sub-s (2) of s 121, whilst, like limb (c) of subs (2) of s 121, it has the words 'bill of exchange', 'promissory note' and 'other negotiable instrument' in it, yet there is a significant difference in the wording between the two limbs: for, unlike limb (c) of sub-s (2) of s 121, this latter limb of s 121(2) does not have the word 'cheque' in it. It merely reads:

I ... and where he has signed, issued or authorised to be signed or issued on behalf of the company any bill of exchange, promissory note or other negotiable instrument or any endorsement thereon or order wherein that name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company ...

[28] This being the scheme of the drafting of the provision, in my judgment, it must be ruled that this particular (or latter) limb of sub-s (2) of s 121, although, like limb (c) of sub-s (2), it applies to bills of exchange, promissory notes and negotiable instruments, it does not, however, apply to cheques. This must be the intention of the Act; for, otherwise, why is it that limb (c) of sub-s (2) of s 121 has the word 'cheque' in it (besides the words 'bill of exchange', 'promissory note' and 'other negotiable instrument'), yet the word 'cheque' was omitted from the subsequent (or latter) limb of sub-s (2) of that section, whilst references to 'bill of exchange', 'promissory note' and 'other negotiable instrument' were retained? If the latter limb does not apply to cheques then the failure to state the current name of the company in each of the four cheques, as a matter of law, does not entitle the plaintiff to claim from the defendant for payment in respect of the sums as specified in the cheques pursuant to s 121(2) of the Companies Act.

[29] In my judgment it is a principle of interpretation of statutes that where the Legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, it must be presumed that the Legislature acts intentionally and purposely in the disparate inclusion or exclusion. There are the principles of construction as pointed out by Bennion on *Statutory Interpretation* (LexisNexis (5th Ed) at pp 1157 & 1160):

> Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different meanings.
>
> *Every word to be given meaning* On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded.
>
> *Different words to be given different meanings* Similarly it is presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning ...

[30] Therefore, the *inclusion* of the word 'cheque' in limb (c) of sub-s (2) of s 121 and the *exclusion* of the word 'cheque' in the latter limb of that subsection was done intentionally and purposely by Parliament; and the court must give effect to the intention of Parliament: that whilst the former limb (limb (c)) applies to cheques, the latter (subsequent) limb does not.

[31] It appears to me that the plaintiff seems to be conscious of the absence of the word 'cheque' in the later limb of sub-s (2) of s 121; and that explains its reliance on the words 'other negotiable instruments' in its written submission

to justify its contention that this latter limb applies to cheques as well. The plaintiff assumes, albeit rather erroneously, that the four cheques are 'negotiable instruments'.

[32] The defendant, however, in her written submission, unfortunately, appears to be oblivious to the absence of the word 'cheque' in the latter limb of the subsection. But assuming that the defendant (or her learned counsel) was in fact conscious of the omission of the word 'cheque' in the latter limb of the subsection in question, it is rather puzzling that she (or her counsel) could have overlooked the fact that such an omission does have an important implication in terms of statutory interpretation — an implication that would be to the defendant's favour.

[33] The learned High Court judge, as I have pointed out earlier, also did not touch on this issue (that is, on the omission of the word 'cheque') in her grounds of judgment.

WHETHER THE FOUR CHEQUES ARE NEGOTIABLE INSTRUMENTS

[34] In any event, even assuming for the moment that the words 'negotiable instruments' in the latter limb of sub-s (2) of s 121 include cheques, as contended by the plaintiff, it is, however, my view that in the present case the four cheques, in law, are not negotiable instruments. It is true that cheques, like bills of exchange and promissory notes, are forms of negotiable instruments. However, in the present case, each of the four cheques is crossed with the words 'A/C PAYEE ONLY'. This makes the cheques non-transferrable. Section 81A of the Bills of Exchange Act 1949 ('the Bills of Exchange Act') provides:

> Non-transferable cheque
>
> 81A (1) Where a cheque is crossed and bears across its face the words 'account payee' or 'a/c payee', either with or without the word 'only', the cheque shall not be transferable, but shall only be valid as between the parties thereto.

[35] Now, one of the basic attributes of a negotiable instrument is the right of the payee to transfer the instrument to another person. In Poh Chu Chai on *Law of Negotiable Instruments* (5th Ed), at p 6, the learned author enlightens us on the law governing negotiable instruments as follows:

> A negotiable instrument generally possesses three main characteristics. First, the instrument is freely transferable. Secondly, a transferee of the instrument is entitled to sue on the instrument in his own name. Thirdly, the instrument enables a bona fide transferee for value of the instrument to acquire a title to the instrument better than the person who transferred the instrument to him. This body of customary usages and practices forms what is now known as the law merchant. The common

law eventually had to give its recognition to these customary practices and the law merchant has since been assimilated as part of the common law.

[36] The common law of England continues to apply in Malaysia by virtue of s 3 of the Civil Law Act 1956.

[37] By crossing a cheque with the words 'Account Payee' the cheque becomes non-transferable meaning that the right of the payee to transfer the instrument is taken away by the instrument. According to the common law, such an instrument is then no longer a negotiable instrument but constitutes a mere contract between the parties (see Poh Chu Chai on *Law of Negotiable Instruments* (5th Ed), at p 384).

CONCLUSION

[38] In the light of the reasons as given the above, I am allowing the appeal with costs of RM10,000 to the appellant/defendant for here and below. The order of the High Court is set aside; and the deposit refunded to the appellant/defendant.

[39] Umi Kalthum JCA has read this judgment and agrees with it.

David Wong JCA:

INTRODUCTION

[40] This is an appeal by the appellant against the decision of the High Court in which the learned judge found the appellant personally liable for four cheques amounting to RM1.1m issued to the respondent on behalf of a company.

[41] On 16 April 2015, we heard the appeal and reserved judgment to 24 July 2015. I now give my grounds and decision.

BACKGROUND FACTS

[42] The factual matrix is fairly straightforward. They are undisputed and are as set out in both the submissions of counsel for the appellant and respondent which I adopt with the appropriate amendments.

[43] YWP Builders Sdn Bhd changed its name to YWP Construction Sdn Bhd on 12 July 2013.

[44] The appellant was at the material time a director of YWP Construction Sdn Bhd.

[45] On 28 March 2013, a consent judgment under Suit No KCH-22–11/1 of 2012 was obtained by the respondent against YWP Builders Sdn Bhd and Yung Wei Pong in which YWP Builders Sdn Bhd and Yung Wei Pong were ordered to jointly and severally pay the sum of RM1.1m by four instalments. It was also ordered that in default of any instalment payment, the whole remaining judgment sum shall be immediately due and payable together with interest at 5%pa.

[46] Pursuant to the consent judgment, YWP Builders Sdn Bhd issued four cheques to the respondent wherein the name of the company stated in the cheques remained as YWP Builders Sdn Bhd as opposed to the new name YWP Construction Sdn Bhd.

[47] The four cheques were for the following sums:

(a) PBB 277319 dated 30 May 2013 for the sum of RM100,000;

(b) PBB 277320 dated 30 June 2013 for the sum of RM330,000;

(c) PBB 277321 dated 30 July 2013 for the sum of RM330,000; and

(d) PBB 277322 dated 30 August 2013 for the sum of RM340,000.

[48] The company number for YWP Builders Sdn Bhd and YWP Construction Sdn Bhd is the same which is 761221-D. The reason is simply that in situation involving only in a change of a company's name the company number remains.

[49] The name of the company when Suit No KCH-22–11/1 of 2012 was commenced was YWP Builders Sdn Bhd and the consent judgment was made in the name of YWP Builders Sdn Bhd.

[50] The cheques issued by YWP Builders Sdn Bhd each bear the name of 'YWP Builders Sdn Bhd' and the aforesaid company number.

[51] As holder of the four post-dated cheques, the respondent filed in an application for an order that the appellant be made personally liable for the four post-dated cheques premised on s 121(2)(c) of the Companies Act 1965.

THE HIGH COURT DECISION AND GROUNDS

[52] The learned judge sustained the respondent's application premised on her construction of s 121(3)(c) of the Companies Act 1965 which reads as

follows:

> If an officer of a company ... signs, issues or authorizes to be signed or issued on behalf of the company any ... cheque or other negotiable instrument ... wherein its name and former name (if applicable) is not so mentioned, he shall be guilty of an offence against this Act, and where he has signed, issued or authorized to be signed or issued on behalf of the company any ... negotiable instrument ... wherein that name and former name (if applicable) is not so mentioned, he shall in addition be liable to the holder of the instrument or order for the amount due thereon unless it is paid by the company.

[53] The learned judge held that the aforesaid provision applies to the factual matrix before her and the rationale in her words is as follows:

> 17 The language employed insection 121(2)(c) Companies Act 1965, as rightly submitted by counsel for the plaintiff, is plain and obvious. It vividly states that the cause of action for personal liability of the cheque signatory arises when the following elements are satisfied:
>
> (a) The cheque wherein its name and former name of the company is not so mentioned has been signed.
>
> (b) The cheque was signed by an officer of a company.
>
> (c) The company has not paid for the amount due on the cheque.
>
> 18 The defendant has not shown what is the other meaning of section121(2)(c) of the Companies Act.
>
> 19 Given that the language in section 121(2)(c) of the Companies Act is plain and obvious, on the high authority of All Malayan Estate Staff Union case cited in *Andrew Lee Siew Ling*, supra, the purposive approach as contended by the Defendant has no application in the present case.
>
> 20 It is plain and obvious that pursuant to section 4 of the Companies Act, the Defendant, being the director of the YWP Construction Sdn Bhd, is an officer of the company. It is not in dispute that the Defendant has signed the four cheques in question and as of today, the company has not paid the money due to the Plaintiff under the Consent Judgment despite the Defendant having received the letter of demand (Exhibit LTP-5). In the premise, pursuant to section 121(2)(c) of the Companies Act, the Defendant shall be liable to the Plaintiff for the sum of RM1,100,000 being the amount due on the four post-dated cheques.

GROUNDS OF DECISION

[54] It is conceded by counsel for the appellant that the three elements listed above have been satisfied if the learned judge's construction of s 121(3)(c) is upheld. However, learned counsel urges the court to adopt a construction reflecting the time we live in now.

[55] In construing any statute, the starting point in my view is s 17A of the

Interpretation Acts 1948 and 1967 which provides as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object"

[56] It can be said then s 17A dictates that the court should first look for the purpose or object of the statute and in this appeal it is s 121(2)(c) .

[57] Learned counsel for the appellant referred the court to the English decisions (*Stacey (F) & Co Ltd v Wallis* [1912] 106 LT 544 , *Penrose v Martyr* (1858) EB & E 499, *Atkins (or Atkin) & Co v Wardle* (1889) 58 LJQB 377, *Banque de' Indochine et de Suez SA v Euroseas Group Finance Co Ltd and Others* [1981] 3 All ER 198) where the English courts considered a similar provision to that section 121(2)(c) in s 63 of the British Companies Act 1908 which reads as follows:

> The Companies Act 1908, provides as follows in section 63 subsection (1): Every limited company ... (c) shall have its name mentioned in legible characters ... in all bills of exchange, promissory notes, endorsement, cheques, and orders for money or goods purporting to be signed by or on behalf of the company,:
>
> Subsection (3) provided that 'if any director, manager or officer of a limited company or any person on its behalf ... signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheques, order for money or goods ... wherein its name is not mentioned in manner aforesaid, he shall be liable to a fine not exceeding fifty pounds, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque or order for money on goods for the amount thereof unless the same is paid by the company'.

[58] The English courts held that 'the intention of the enactment plainly was to prevent persons from being deceived into believing that they had a security with the unlimited liability of common law when they had but the security of a company limited' (as per Justice Crompton in *Penrose v Martyr* (1858) EB & E 499)

[59] Denman J in *Atkins (or Atkin) & Co v Wardle* (1889) 58 LJQB 377 commenting on s 41 and 42 of the Companies Act 1862 (England) said as follows:

> ... the intention of the Act was to ensure extreme strictness in all transactions in behalf of limited companies as regard to the use of the registered name of the company, not only in enforcing the use of the word 'limited', but in all other respects. Cases may easily be conceived in which a very slight variation for the registered name might lead a person to believe that he was taking a bill of a totally different kind of company from that to which the directors signing the bill really belonged; it may well be conceived that ss 41 and 42 were inserted, or rather

re-enacted, by the Legislature, as they were after the decision of *Penrose v Martyr* (E.B. and E., 499) with the intention of ensuring the strictest accuracy in this respect for the protection of the public.

[60] Premised on the English authorities, it can be said that the object of s 121(2)(c) is to ensure that the payees of cheques are not deceived into believing that the director is signing on behalf of a totally different entity from that the director signing the cheques belongs to. The question to be asked whether in the circumstances before this court was there any deception here.

[61] To recap, it is undisputed here that the appellant was never a party to the consent judgment which was between the respondent, YWP Builders Sdn Bhd and Yung Wei Pong. That consent judgment required payments from YWP Builders Sdn Bhd and not from the appellant. However the appellant being a director of YWP Builders Sdn Bhd issued four cheques to comply with the consent judgment. The crucial undisputed fact is that YWP Builders Sdn Bhd has by then changed its name to YWP Construction Sdn Bhd and the four cheques though still carried the old name of YWP Builders Sdn Bhd had the same company number which in law never changes despite of any name changes.

[62] With that same company number endorsed on the four cheques, can it be said that the respondent had been deceived or that the appellant had the intention to deceive. It is my view that the answer must be in the negative. It is undisputed that when s 121(2)(c) was enacted in 15 April 1966, it can be said that the existence and requirement of having the company's number endorsed on the cheques was not envisaged. Applying the purposive approach in constructing statute, one must take into account of the present prevailing circumstances and then give it an interpretation which enhances the object of the Act. In the context of s 121(2)(c) , it is my interpretation that the appellant should not be held liable as there is no deception as envisaged in s 121(2)(c) .

[63] Further one must not lose sight of a basic principle of Company Law and that is the rule of *Foss v Harbottle* which prescribes that a company is a separate and independent legal entity which can be sued or sue. Only by clear legislation, can this basic principle be dismantled. Hence in interpreting s 121(2)(c), this basic principle must be given its due regard which I have done so.

CONCLUSION

[64] This is another case where there is no local case law on a specific provision of our Companies Act. Be that as it may, I am guided by the s 17A of the Interpretation Acts 1948 and 1967 to give it an interpretation which not

only enhances the object of s 121(2)(c) but also reflect the time which we live in. Legislations must continue to evolve and courts have a duty in this respect provided of course it does not do damage to the words employed therein.

[65] The interpretation which I have given reflects what I said in the previous paragraph.

[66] Accordingly I find that the respondent does not have a cause of action under s 121(2)(c) and allow the appeal with costs in the sum of RM10,000 for here and below. I also order that the orders of High Court be set aside and the deposit be refunded to the appellant.

Appeal allowed with costs of RM10,000.

Reported by Kohila Nesan